STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 12, 2007
v	No. 267612 Wayne Circuit Court
JOHNATHAN ALAN DENTON, Defendant-Appellee.	LC No. 05-002629-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 267790 Wayne Circuit Court
JOHNATHAN ALAN DENTON, Defendant-Appellant.	LC No. 05-002629-01

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

In Docket No. 267790, defendant appeals as of right his jury trial convictions for three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (sexual penetration with a person at least 13 years of age and under 16 years of age). Defendant was sentenced to 1 to 15 years' imprisonment for his convictions. In Docket No. 267612, the prosecution appeals as of right defendant's sentence. We affirm defendant's convictions, but we remand to the trial court to determine whether it would have found substantial and compelling reasons to deviate from the sentencing guidelines if it had only considered appropriate factors.

In July 2004, defendant was eighteen years old. He attended a high school graduation party where he consumed alcohol and fraternized late into the night. He pulled his truck near the back-yard bonfire so that the group could listen to music. The graduate's fourteen-year-old sister and her thirteen-year-old female friend rejoined the party at around three o'clock in the morning, and defendant gave them beer to drink. The evidence also suggested that the girls smoked marijuana. Defendant asked the girls to kiss each other, which they did, and then he kissed the thirteen-year-old friend and escorted the girls to an area behind his truck. Although the

prosecutor provided evidence that defendant fondled the sister's friend, the jury did not find the evidence persuasive. In any event, the thirteen-year-old friend soon returned to the party, and defendant remained behind the truck with the graduate's sister. There he digitally penetrated her vagina, coerced her into performing fellatio on him, and had sexual intercourse with her. The intercourse was interrupted by one of the graduate's close friends, Zachery Frascarelli, who came looking for the victim. According to Frascarelli, defendant was lying on top of the victim when he approached, and her pants were nearly pulled off. Frascarelli testified that defendant later tried to explain the incident by claiming that the petit victim had pulled him onto herself.

Defendant's theory at trial was that he was a homosexual, so he would not have performed the alleged acts. He flatly denied having any physical contact with the girls at the party and denied that any of the relevant events described by prosecution witnesses had any basis in reality. The jury did not return a guilty verdict on the charges relating to defendant's alleged fondling of the sister's friend, but it found defendant guilty on all the charges relating to the sister.

Defendant first argues that he was denied his right to a fair trial because the prosecutor repeatedly engaged in misconduct. We disagree. We review a defendant's preserved claim of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, defendant failed to preserve all but one of his claims of misconduct with an objection, so we review the unpreserved claims for plain error that affected his substantial rights. *Id*. Similarly, we will not disturb a jury verdict on the basis of an unpreserved claim of misconduct unless the misconduct was so egregious that a timely instruction from the court would not have effectively cured the prejudice caused by the misconduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first argues that the prosecutor improperly questioned him regarding the credibility of the prosecution's witnesses, challenging him to call them liars. We agree. Cross-examining a defendant with inquiries into the veracity of other witnesses has been clearly condemned as misconduct for at least twenty years. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Here, the prosecutor essentially went through the prosecution's witness list and asked defendant whether each witness had lied on the stand. The prosecutor's cross-examination of defendant consisted of little more than an attempt to bait defendant into calling each of the opposing witnesses liars. *Id*. Without question, "it was improper for the prosecutor to ask defendant to comment on the credibility of prosecution witnesses." *Id*. However, the practice went unabated because defense counsel never objected to the prosecutor's questions as inappropriate misconduct. A proper objection could have preempted any prejudice to defendant by striking down the question before defendant answered it. *Stanaway*, *supra*. In the end, defendant handled the questioning fairly well, and the evidence against him was overwhelming, so we are not persuaded that the misconduct impinged on his substantial rights.[1] Moreover,

[1] We note that this improper examination technique has another frustrating aspect: it is generally ineffective and prone to backfire. A prosecutor with a clear-cut case such as this one would do well to focus on facts rather than divert the jury with cross-accusations. Of course, the practice also improperly insinuates reliance on the sheer number of witnesses and generally confuses the

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defense counsel arguably "opened the door" to this line of questioning when, during direct examination, he asked defendant to testify at length about Frascarelli's history and reputation for truthfulness. Although the prosecutor's line of questioning should have been limited to Frascarelli's veracity, we are not persuaded that the cross-examination questions constituted plain error or otherwise irreparably denigrated the integrity of the proceedings. *Ackerman, supra* at 448-449.

Defendant next argues that the prosecutor repeatedly asked the young girls to vouch for their own credibility. However, defendant fails to provide any authority for the proposition that a witness cannot testify that they are telling the truth. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant also argues that the prosecutor elicited improper opinion testimony from a police lieutenant regarding whether defendant knew Frascarelli. We disagree. The lieutenant testified that defendant initially denied knowing the young man, but it was later determined that defendant knew him. Although this testimony undermined defendant's credibility, the prosecutor's question and the lieutenant's answer were proper. The lieutenant's testimony was not opinion testimony, but instead was a recitation of information he had gathered during his investigation. At most, defendant could have challenged the testimony's foundation, but it was not misconduct for the prosecution to offer the evidence in good faith. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant next argues that the prosecutor elicited improper testimony from the lieutenant regarding his police report. Defendant argues that the report was a hearsay statement, and it was improper for the lieutenant to read from it while testifying. However, the record does not support defendant's claim. The claim centers on the lieutenant's claim that defendant told him he was a bisexual, not a homosexual. The lieutenant testified about the conversation from his recollection and then testified that he quoted defendant's statement verbatim in his report. Nevertheless, nothing in the record suggests that the lieutenant read straight from the report or otherwise published it to the jury, so defendant has failed to demonstrate that the lieutenant did not simply remember quoting defendant in his report. Therefore, we reject defendant's claim as factually unfounded.

Defendant further argues that the prosecutor engaged in misconduct when she elicited hearsay testimony from the victim's friend regarding a conversation that she had with the victim. However, the record reveals that the prosecutor asked the friend a direct and limited question about whether the friend spoke to the victim after the ordeal, and the friend provided the unresponsive hearsay answer containing the victim's accusatory communication. Although the statement was a hearsay statement, it does not appear that the prosecutor improperly elicited the statement. Instead, it was an improper response to a proper question. See *People v Griffin*, 235 Mich App 27, 36-37; 597 NW2d 176 (1999). Nothing indicates that the prosecutor's question

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relevant issues, and a prosecutor should never rely on these strategies as an effective means of persuasion.

was a deliberate attempt to introduce improper hearsay. On the contrary, the statement's proximity to the crime means that the prosecutor could have probably countered defendant's hearsay objection with the excited utterance exception, but instead the prosecutor immediately conceded the objection and admonished the witness. Under the circumstances, defendant fails to demonstrate any bad faith. *Noble, supra*.

Defendant further argues that the prosecutor vouched for the girls' credibility during her closing arguments. However, the prosecutor merely stated to the jury that the girls' testimony should be believed because of the evidence presented by the prosecution, not because of any special knowledge the prosecutor had about the case. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). "A prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id.* The prosecutor in this case only pointed to the record for reasons to accept the girls' testimony, so the comments were proper. *Id*.

Defendant further argues that the prosecutor denigrated him when she stated that he was "getting off" watching the girls kiss. We disagree. A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). However, the evidence showed that defendant asked the girls to kiss and they did. Defendant watched them kiss and then he allegedly kissed the victim's friend. Defendant's theory of the case was that he had no sexual interest in females, so the prosecutor's inquiry into defendant's sexual stimulation was gruff, but appropriate. Prosecutors may use "hard language" when the evidence supports it, and are not required to water down their presentations of the evidence for risk of offending a jury with a defendant's actual conduct. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Here, the evidence supported the fact that defendant encouraged sexually charged behavior between the girls for his gratification, so the prosecutor's inquiry was proper.

Defendant further argues that the prosecutor improperly appealed to the sympathy of the jury. We disagree. Although a prosecutor may not appeal to a juror's sympathy, a prosecutor may use emotional language during closing argument. *Ackerman, supra* at 454. Here, the prosecutor asked the jury to convict defendant based on the evidence and asked them not to have sympathy for him. Therefore, the prosecutor did not improperly appeal to the sympathy of the jury but instead asked them to exclude sympathy for defendant from their deliberations and focus on the facts. Because the argument was emotionally charged but always led the jury back to the facts, the argument was appropriate. *Id*.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. On appeal, defendant requests a *Ginther*[2] hearing and attaches an affidavit from one of his friends as evidence of his trial counsel's ineffective representation.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

Defendant argues that the prosecutor improperly asked leading questions of the two girls on direct examination, and that trial counsel was ineffective for failing to object. We disagree. A prosecutor has considerable leeway to develop a child's testimony, including the latitude to ask leading questions where necessary. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). The prosecutor in this case took pains to avoid phrasing her questions in ways that would imply their answers, so any objection by defense counsel would have been meritless. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant further argues that the prosecutor used improper leading questions when questioning Frascarelli and the police lieutenant. Although defendant argues that the prosecutor asked these witnesses several leading questions, a review of the record fails to support defendant's claim. To merit reversal, the use of leading questions must have a substantial prejudicial effect or demonstrate a pattern of eliciting inadmissible testimony. *Watson*, *supra* at 588. Here, the challenged questions were about preliminary issues, and the prosecutor did not make any pattern of suggesting answers to the witnesses. Therefore, defendant's grounds for objection lack merit. *Rodriguez*, *supra*.

Defendant next argues that counsel was ineffective because he failed to move to strike the hearsay statement of the victim's friend. We disagree. The jury was already exposed to the hearsay, and the prosecutor immediately agreed with the objection and admonished the witness, so defense counsel could have strategically decided that any further instruction from the judge would only have caused the jury to dwell on the issue. *Riley*, *supra*. Moreover, the challenged statement was subsequently presented through the victim's testimony, so defendant fails to demonstrate any prejudice from the omission.

Defendant further argues that counsel was ineffective for failing to impeach the victim with her police statement. We disagree. Defendant argues that her testimony minimized the amount of alcohol she had consumed on the night of the assault. Defendant mistakenly argues that the victim's testimony was inconsistent with her statements to police. In fact, the statements consistently reflected that the victim consumed roughly three beers on the night of the assault, so the premise to defendant's argument fails.

Defendant also argues that counsel was ineffective because he failed to call a potential witness. Defendant argues that if the witness had testified, he would have corroborated defendant's testimony that he did not engage in sexual misconduct that night. We disagree. "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People*

v Kelly, 186 Mich App 524, 526-527; 465 NW2d 569 (1990). Defendant relies on an unsigned, un-notarized, typewritten statement allegedly prepared by a friend who had attended the graduation party. According to the statement, while leaving, the friend saw Frascarelli sleeping and the two girls kissing inside the truck while defendant changed compact discs. Although the statement affirms defendant's testimony that he did not touch the girls inappropriately in the friend's presence, it also confirmed that defendant was near the kissing girls away from the bonfire and around the truck. Under the circumstances, the statement does not persuade us that the friend could provide defendant with a successful defense to the crimes. *Id.*

Defendant also argues that trial counsel ineffectively represented him by failing to object to the prosecutor's questions about the veracity of prosecution witnesses. We disagree. Although the prosecutor's questions erroneously baited defendant into calling the opposing witnesses liars, defendant handled the questions well, and defense counsel did object whenever the questioning grew argumentative or speculative. Under the circumstances, trial counsel may have wanted the jury to receive the impression that defendant had no desire to hide anything, but the prosecution witnesses were falsely accusing defendant to make him into a scapegoat. Viewed in this light, the prosecutor's questions fit well with defendant's theory of the case, and defendant was not prejudiced by the questions. We will not vacate a verdict merely because trial counsel's strategy fails, or even backfires. *Riley*, *supra*. The balance of defendant's ineffective assistance arguments depends on our agreement with several of his above claims of error. Because we reject his claims of error, his trial counsel's performance was not diminished by remaining silent rather than registering meritless objections. *Rodriguez*, *supra*.

Lastly, defendant argues that the cumulative effects of multiple errors denied him a fair trial. We disagree. We review this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Because the only errors raised were either de minimis or unpreserved and insubstantial, we are not persuaded that they cumulatively affected the trial's fairness.

In Docket No. 267612, the prosecution argues that the trial court significantly departed from the sentencing guidelines without articulating substantial and compelling reasons for its departure. Although we disagree with many of the arguments presented by the prosecution, we agree that defendant's lack of criminal record was already accounted for in the sentencing guidelines and should not have been given additional consideration.

By sentencing defendant to a minimum sentence of one year, the trial court departed from the sentencing guidelines range by 39 months. The recommended minimum range was 51 to 85 months. When discussing its reasons for the downward departure, the trial court stated the following:

> I do believe that this is a case where this court should go below the guidelines and I'm going to do so, and I'm going to do it for all the reasons pointed out by the defense, the defendant's age, the fact that he's never been in trouble before, the fact that I sense that both of these families are very supportive of these young people, and both families are going to be there to support them from this point on, to help them through all of this, so he has great family support. And the fact that I don't like the situation of how it developed, the fact that the alcohol was provided

> to these young people to the wee hours in the morning, and I just don't think it's the kind of situation that deserves a harsh sentence.

A defendant's age is an objective and verifiable factor that a trial court may consider in determining whether it should depart from the guidelines. *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000). A defendant's family support and the facts of the crime that mitigate a defendant's culpability may also constitute objective reasons to deviate from the guidelines. *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994). Therefore, the trial court correctly considered defendant's age, family support, and the other mitigating factors of the evening in determining whether it should depart from the guidelines.

However, the trial court also considered the fact that defendant lacked a prior criminal record. Although a defendant's prior criminal record, or lack thereof, is an objective and verifiable factor, see *Daniel*, *supra*, defendant's lack of a criminal record was already taken into consideration when the sentencing guidelines' prior record variables were scored. "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). Although a lack of criminal history was found to be objective, substantial, and compelling in *Daniel*, *supra* and *Harvey*, *supra*, the statute unambiguously requires the court to either disregard factors that were already considered in the guidelines' score or to explain, on the record, how the factor was given inadequate or disproportionate weight in a particular case. MCL 769.34(3)(b). This record does not reflect the trial court's reasoning, so we must reject this factor. *People v Babcock*, 469 Mich 247, 259; 666 NW2d 231 (2003). However, we cannot determine whether the trial court would have departed to the same degree had it not taken defendant's lack of a prior criminal record into consideration. *Id.* at 260-261. Accordingly, we remand the case for clarification of the record or, in the alternative, a determination whether the remaining, valid factors provided substantial and compelling reasons to support the sentence even without considering defendant's criminal history. *Daniel*, *supra* at 8-9. If the trial court cannot articulate the guidelines' deficiency or justify the sentence without resorting to the improper factor, then it must resentence defendant.

Affirmed in part but remanded to the trial court to clarify the record or determine whether there are substantial and compelling reasons to deviate from the sentencing guidelines when only appropriate factors are considered. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray